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Parallel Jurisdiction: If the Court of Claims Can, Why Not the Administrative Boards

Cover Page Footnote

Member of the New York and District of Columbia Bars. * Member of the Connecticut and District of Columbia Bars. * The authors wish to acknowledge the assistance of C. Stanley Dees, a member of the Virginia and District of Columbia Bars and an associate in the firm of Sellers, Conner & Cuneo.

PARALLEL JURISDICTION: IF THE COURT OF CLAIMS CAN, WHY NOT THE ADMINISTRATIVE BOARDS?

GILBERT A. CUNEO* & ELDON H. CROWELL**

I. INTRODUCTION***

TRADITIONALLY, the cases and commentaries have declared that, when the Government steps down from its position of sovereignty and enters the domain of commerce,¹ it submits itself to the same laws that govern the businessman.² Traditionally, the cases also state that the rights of the parties under a government contract are to be determined by the application of the same principles as if the contract were between individuals.³ But the differences between government contracts and private contracts are now being more thoughtfully considered.

In many areas government procurement contracts are utilized as instruments to attain national goals which are by consensus considered socially desirable.⁴ Government contracts reflect a power relationship, and not a consensual agreement between equals.⁵ Recognition is slowly developing of the fact that government contracts are contracts of adhesion.⁶ This difference between public and private contracts should be always

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1. The present volume of this "domain of commerce" approximates one hundred billion dollars annually.

2. *Cooke v. United States*, 91 U.S. 389, 393 (1875). See Shealey, *Government Contracts* 4 (3d ed. 1938).

3. *Reading Steel Casting Co. v. United States*, 268 U.S. 186, 188 (1924); *Smoot's Case*, 82 U.S. (15 Wall.) 36, 47 (1872).

4. See *Austin Co. v. United States*, — Ct. Cl. —, 314 F.2d 518 (1963).

5. Miller, *Government Contracts and Social Control: A Preliminary Inquiry*, 41 Va. L. Rev. 27, 57 (1955).

6. Kessler, the leading authority, describes contracts of adhesion as follows: "Standard contracts are typically used by enterprises with strong bargaining power. The weaker party, in need of the goods and services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses. His contractual intention is but a subjection more or less voluntary to terms dictated by the stronger party, terms whose consequences are often understood only in a vague way, if at all. Thus, standardized contracts are frequently contracts of adhesion; they are à prendre ou à laisser." Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 Colum. L. Rev. 629, 632 (1943). (Italics omitted.)

kept in mind in analyzing problems which arise under public contracts.⁷ This difference is also important in the resolution of disputes.

The two most important forums for the resolution of disputes are the Court of Claims⁸ and the various administrative boards,⁹ which are multiplying almost daily.¹⁰ This article will not discuss in depth each of these boards¹¹ or the Court of Claims.¹² The purpose of the article is to advance the thesis that, in the light of recent Supreme Court decisions, the Court of Claims and the various administrative boards should have parallel jurisdiction. The administrative boards can and should hear, consider, decide and grant relief under all situations when the Court of Claims itself has jurisdiction. The traditional dichotomy between administrative relief and breach of contract relief should be discarded in favor of a more flexible approach by the administrative boards.

II. THE DISPUTES CLAUSE AND ADMINISTRATIVE BOARD JURISDICTION

The typical government contractor often finds himself in one of the following situations: (1) where the Government wishes to make a change in plans or design; (2) where the product cannot be manufactured according to the specifications, but the Government wants and needs the product in some form immediately; (3) where the subsurface conditions are not as reasonably expected or weather is unusually adverse, but the Government wants the project to continue and often wants the original deadline kept; (4) where the Government wishes to call a tem-

7. Cuneo & Crowell, *Impossibility of Performance: Assumption of Risk or Act of Substitution?*, 29 *Law & Contemp. Prob.* 531, 548-50 (1964).

8. See 28 U.S.C. § 1491 (1958); *Glidden v. Zdanok*, 370 U.S. 530 (1962).

9. At present there are at least fourteen boards of contract appeals in the various departments and agencies engaged in construction and in the procurement of supplies and services by contract. The major boards in descending order of case load as of the end of 1963 are: The Armed Services Board of Contract Appeals; the General Services Administration Board of Contract Appeals; the Post Office Department Board of Contract Appeals; the Department of Interior Board of Contract Appeals; the National Aeronautics and Space Board of Contract Appeals; and the Atomic Energy Commission Board of Contract Appeals.

10. The part played by the General Accounting Office in this whole picture is not now being considered since it has no disputes procedures, although its jurisdiction is so broad that almost any procedure could presumably be promulgated.

11. For more detailed information see Miller, *Administrative Determination and Judicial Review of Contract Appeals*, 29 *Law & Contemp. Prob.* 111 (1964); Staff of Senate Comm. on the Judiciary, 88th Cong., 2d Sess., *Statistical Data Related to Administrative Proceedings* (Comm. Print 1964); Hearings Before the Subcommittee for Special Investigations of the House Armed Services Committee Under H.R. Res. 67, *Inquiry Into the Administration and Operations of the Armed Services Board of Contract Appeals*, 85th Cong., 2d Sess. 796-97, 819 (1958).

12. See Note, *The Application of Common-Law Contract Principles in the Court of Claims: 1950 to Present*, 49 *Va. L. Rev.* 773 (1963).

porary halt in order to make changes, correct errors or review the situation. All of these instances cost the contractor money. In private contract situations he would have the option of refusing; in government contracts, however, he must grant the Government's request as long as it is within the scope of the contract language. His remedy under a government contract, in most cases, is an equitable adjustment; and to the extent that this relief is dispensed by the contracting officer and the boards of contract appeals, there is no need for an action sounding in breach of contract.

The disputes clause¹³ of a government contract is the instrument by which the Government insures that contract performance continues in accord with the contracting officer's decision and that the contractor pursues an administrative remedy before the board of contract appeals. As stated by a member of the Armed Services Board of Contract Appeals [hereinafter referred to as ASBCA]:

When the government reserves the right to order the contractor to make changes and to proceed with performance in accordance with the government's interpretation, regardless of who is right, common fairness requires that the contract provide a means of compensating the contractor for work required by the government that is not covered by the contract price. It might be said that the disputes clause constitutes an agreement by the contractor to proceed as directed by the government in consideration of which the government agrees to pay the contractor an equitable adjustment in price, if the government's direction to proceed involves extra work not included in the contract price.¹⁴

Basically, the disputes clause, as found in standard government contract forms, provides: that disputes as to questions of fact arising under the contract are to be decided by the contracting officer; that the decision of the contracting officer is final as to both parties, but the contractor has a right of appeal if he exercises it within thirty (30) days; and that on appeal to the head of the department or his representative (the applicable board of contract appeals), the board's decision is final and binding on both parties, subject to the standards of review contained in the Wunderlich Act.¹⁵

Problems were experienced in earlier days because of limits, real or imagined, contained in the board's charter,¹⁶ but the current charter cor-

13. Armed Services Procurement Reg. 7-103.12, 32 C.F.R. § 7.103-12 (1961), as amended, 32 C.F.R. § 7.103-12 (Supp. 1964) (supply) and Armed Services Procurement Reg. 7-602.6, 32 C.F.R. § 7.602-6 (Supp. 1964) (construction).

14. Shedd, *Disputes and Appeals: The Armed Services Board of Contract Appeals*, 29 *Law & Contemp. Prob.* 39, 40 (1964).

15. 68 Stat. 81 (1954), 41 U.S.C. §§ 321-22 (1958).

16. See the Secretary of War's Memorandum dated July 4, 1944, 9 *Fed. Reg.* 9463 (1944), the original (1945) charter of the ASBCA.

rectly assumes that the ASBCA has jurisdiction over any appeal involving a claim that is "cognizable under the terms of the contract."¹⁷ Decisions on questions of law are permitted where necessary for the complete adjudication of the issue.¹⁸

Jurisdiction and finality are, of course, separate and distinct matters. By incorporating the standards of review of the Wunderlich Act, the disputes clause also sets forth the degree of finality to be accorded the board's decision: "Provided, however, that any such decision [concerning a question of fact arising under this contract] shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith or is not supported by substantial evidence."¹⁹

However, the clause does not determine the *method* by which the reviewing court will apply the finality tests. The Court of Claims had traditionally held that a de novo trial was necessary in which evidence outside the administrative record may be introduced.²⁰ Several of the circuit courts of appeals had held differently.²¹ *United States v. Carlo Bianchi & Co.*,²² has now settled this question: "We hold only that in its consideration of matters within the scope of the 'disputes' clause in the present case, the Court of Claims is confined to review of the administrative record under the standards in the Wunderlich Act and may not receive new evidence."²³ Earlier in the decision the court had said: "It is our conclusion that, apart from questions of fraud, determination of

17. Armed Services Procurement Reg. 30.1, app. A, pt. I, 32 C.F.R. § 30.1 app. A, pt. I (Supp. 1964). The new rules of the Atomic Energy Board of Contract Appeals are more liberal and permit decisions on all questions of fact and law. 29 Fed. Reg. 12831 (1964). Official commentary on them states that they manifest the Commission's intent to vest the Board with the broadest of powers "in order to enable the Board to make a full and final administrative disposition of the appeal." 29 Fed. Reg. 12830 (1964).

18. See charter set forth note 34 *infra*.

19. Armed Services Procurement Reg. 7-602.6, 32 C.F.R. § 7.602-6 (Supp. 1964) (construction). Both this clause and the second section of the Wunderlich Act preclude finality from attaching to a decision on a question of law. 68 Stat. 81 (1954), 41 U.S.C. § 322 (1958). For a good discussion of the problems inherent in the law-fact distinction, see Birnbaum, Questions of Law and Fact and the Jurisdiction of the Armed Services Board of Contract Appeals, 19 Fed. B.J. 120 (1959); Spector, "Law" is Where You Find It, or "Fact" is in the Eyes of the Beholder, 19 Fed. B.J. 212 (1959).

20. E.g., *Carlo Bianchi & Co. v. United States*, 144 Ct. Cl. 500, 169 F. Supp. 514 (1959), *rev'd*, 373 U.S. 709 (1963); *Volentine & Littleton v. United States*, 136 Ct. Cl. 571, 145 F. Supp. 952 (1956).

21. *McKinnon v. United States*, 289 F.2d 908 (9th Cir. 1961) (*per curiam*); *Wells & Wells, Inc. v. United States*, 269 F.2d 412 (8th Cir. 1959).

22. 373 U.S. 709 (1963).

23. *Id.* at 718.

the finality to be attached to a departmental decision on a question arising under a 'disputes' clause must rest solely on consideration of the record before the department.²⁴

The Court of Claims, therefore, is limited to an examination of "the administrative record." This in itself raises very important questions as to the record made before the administrative agency and implementation of the decision is already causing difficult procedural problems before the Court of Claims²⁵ and the ASBCA.²⁶ These considerations, however, are beyond the scope of this article.²⁷ Some authors suggest that critics of *Bianchi* are only attempting to preserve "two bites of the apple."²⁸ It is suggested, however, that the more important consideration is that both the administrative boards and the Court of Claims be able to look at (and bite) the same apple as well as the whole apple. The boards are now willing to look at only part of the apple; the remaining part is being rejected as beyond their jurisdiction. While particular attention will be paid to the ASBCA because it is by far the largest of the boards, it should be remembered that the problems are involved before all the boards.

24. *Id.* at 714.

25. For example, there is sometimes a question as to what comprises the administrative record, who can certify as to its contents and how it can be brought before the court.

26. The *Bianchi* decision is predicated upon the existence of a complete record and a thorough and impartial hearing. *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 716-17 (1963). In order to be bound by the administrative record, the contractor should get the same procedural benefits and safeguards from the boards as are afforded by the courts. The ASBCA has already recognized not only the validity of this principle, but also the logical extension of this rule into the specific area of discovery. Speaking for the Board in a pre-hearing conference memorandum in *Exotic Metal Prods.*, A.S.B.C.A. 9338, 9404, 9428, 9568 (1964), Board Member Joel P. Shedd, Jr., stated: "The Hearing Member announced that it was the Board's policy to require the Government to produce prior to the hearing for examination by the appellant any documents or information which could be obtained by discovery proceedings the same as if the case were before the Court of Claims or a United States District Court. This rule applies also when the discovery is being sought by the Government against the appellant. In view of the Supreme Court decision in *Bianchi*, it is the Board's policy to lend its efforts to the parties in obtaining any evidence that could be obtained in a court proceeding." This position has also been adopted by the Department of Interior Board of Contract Appeals. See *Vitro Corp.*, I.B.C.A. 376, 1964 B.C.A. ¶ 4360. With the exception of the Atomic Energy Commission, however, the boards do not have subpoena powers. 5 U.S.C. § 94 (1958) provides a cumbersome procedure which has been used but is not practical.

27. For a contrary view see Spector, *Is It "Bianchi's Ghost"—Or "Much Ado About Nothing"?*, 29 *Law & Contemp. Prob.* 87 (1964). Other writers, however, have taken a more serious view of these problems. E.g., Schultz, *Wunderlich Revisited: New Limits on Judicial Review of Administrative Determination of Government Contract Disputes*, 29 *Law & Contemp. Prob.* 115 (1964).

28. See Spector, *supra* note 27, at 107.

The use of a board to decide contract claims was sanctioned by the Supreme Court almost one hundred years ago.²⁹ During World War II the Secretary of War set up the War Department Board of Contract Appeals by his Memorandum dated August 8, 1942.³⁰ Later, the same official established the outer limits of the board's authority in his famous Memorandum of July 4, 1944.³¹ In *McWilliams Dredging Co. v. United States*,³² the Court of Claims gave it a very broad and sweeping interpretation when it declared:

It is evident that the Secretary was authorizing the Board to act for him in the way that any owner would act if a contractor was dissatisfied with the way he was treated by the owner's representative in charge. He would listen to the contractor's story, and if he thought that his representative had been unfair, he would reverse him. He would do this, not because the contract gave him any authority to make a final decision which would bar the contractor from relief in the courts for breach of contract, but because it would be the natural and fair way for an owner to act. And just as the contractor in the supposed case could sue for breach of contract if his appeal to the owner did not give him satisfactory relief, so can the contractor with the Government, if he has not contracted away his right to do so.³³

The ASBCA, however, has consistently and often unnecessarily limited its jurisdiction. It has refused to consider those cases which fall within the broad category of breach of contract, or otherwise termed by the various boards as not arising under the contract.³⁴ A number of clauses³⁵

29. *United States v. Adams*, 74 U.S. (7 Wall.) 463 (1868). For an excellent discussion of the historical development of the ASBCA and its predecessors, see Shedd, *supra* note 14, at 42-64.

30. 7 Fed. Reg. 10188 (1942).

31. See note 16 *supra*.

32. 118 Ct. Cl. 1 (1950).

33. *Id.* at 16-17.

34. See, e.g., *Lenoir Wood Finishing Co.*, A.S.B.C.A. 7950, 1964 B.C.A. ¶ 4111; *Groban Supply Co.*, A.S.B.C.A. 9310, 1964 B.C.A. ¶ 4258; *Electric Properties Co.*, I.B.C.A. 443-5-64, 1964 B.C.A. ¶ 4415.

Paragraph 5 of the charter of the ASBCA states: "When an appeal is taken pursuant to a disputes clause in a contract which limits appeals to disputes concerning questions of fact, the Board may nevertheless in its discretion hear, consider, and decide all questions of law necessary for the complete adjudication of the issue. When in the consideration of an appeal it appears that a claim is involved which is not cognizable under the terms of the contract, the Board may, insofar as the evidence permits, make findings of fact with respect to such a claim without expressing an opinion on the question of liability." *Armed Services Procurement Reg.* 30.1 app. A, pt. I, cl. 5, 32 C.F.R. § 30.1 app. A, pt. I, cl. 5 (Supp. 1964).

35. E.g., *Armed Services Procurement Reg.* 7-103.2, 32 C.F.R. § 7.103-2 (1961), as amended, 32 C.F.R. § 7.103-2 (Supp. 1964) (supply) and *Armed Services Procurement Reg.* 7-602.3, 32 C.F.R. § 7.602-3 (Supp. 1964) (construction); *Default*, *Armed Services Procurement Reg.* 7-103.11, 32 C.F.R. § 7.103-11 (1961) (supply) and *Armed Services Procurement Reg.* 7-602.5, 32 C.F.R. § 7.602-5 (Supp. 1964) (construction—Delay-Damages); *Termination for Convenience of the Government*, *Armed Services Procurement Reg.* 7-103.21, 32 C.F.R.

permit and bring within the scope of the government contract, actions which would normally constitute breach of contract in a commercial setting. These contract clauses have broadened the jurisdiction of the boards and, in addition, the boards have adopted other devices so that more and more claims "arising under the contract" do not constitute a breach of contract. This trend should continue and be expanded now that the Court of Claims can only review on the basis of the administrative record. In speaking of this trend, a member of the ASBCA has stated:

This trend has continued to the point where the field of claims for breach of contract that are not regarded as "arising under the contract" is becoming very narrow indeed. Also there has been an increasing tendency for contract appeal boards to give a broad interpretation to contract clauses as vehicles for the administrative settlement of meritorious contract claims. Decisions where ASBCA dismisses an appeal for lack of jurisdiction as involving a claim for breach of contract are becoming increasingly rare.³⁶

Unfortunately, a study of recent decisions of the various boards indicate that the above stated conclusions of the board member are too optimistic.³⁷ The boards can and should examine all situations and grant administrative relief without rejecting jurisdiction because the cause of action sounds in breach of contract to old ears trained in courts of law on private contract situations. Through the expanded use of existing clauses and particularly the doctrine of constructive change orders, the boards can, if they will, make "equitable adjustment" a replacement (synonym) for "damages."

Contrary to the practice of the boards, the Court of Claims does not appear to view the distinction between damages for breach of contract and equitable adjustment as one of great moment. In *Western Contracting Corp. v. United States*,³⁸ the plaintiff correctly interpreted the specifications as permitting it to finish within two working seasons, but the contracting officer insisted on carrying the work over until the third season. The Court of Claims acknowledged that the actions of the contracting officer in refusing to permit performance in accordance with the schedule was a breach of contract but also that the plaintiff was entitled to an equitable adjustment. The court concluded by saying that the refusal of the contracting officer to make an equitable adjust-

§ 7.103-21 (1961) (supply) and Armed Services Procurement Reg. 7-602.29, 32 C.F.R. § 7.602-29 (Supp. 1964) (construction); Suspension of Work, Armed Services Procurement Reg. 7-604.3, 32 C.F.R. § 7.604-3 (Supp. 1964).

36. Shedd, *supra* note 14, at 74.

37. See cases cited note 33 *supra*.

38. 144 Ct. Cl. 318 (1958).

ment constituted a breach of contract. Then, noting that the plaintiff wished recovery in the form of an equitable adjustment and that the court had granted this form of relief before, the court awarded jury-verdict damages.³⁹

In *Hoffman v. United States*⁴⁰ the court awarded an equitable adjustment under the changed conditions clause. It could have granted relief on the theory of breach of contract for failure to cooperate which has been used as an appropriate remedy.⁴¹ It is suggested that the various boards, like the Court of Claims, should be less concerned with formalistic legal theories and more concerned with practical parallel jurisdiction with the Court of Claims, its appellate body.

III. CONSTRUCTIVE CHANGE, IMPOSSIBILITY OF PERFORMANCE AND ACCELERATION

In some situations the boards have adopted this more practical approach and have ignored the distinction between "damages for breach of contract" and "equitable adjustment under the contract," rather than dismiss for lack of jurisdiction. This has already occurred in three important areas, *i.e.*, constructive changes, impossibility of performance and acceleration.

A. *The Constructive Change Order*

The constructive change order is a mechanism whereby the board directs the contracting officer to do retroactively that which he should have done *ab initio*. Sometimes the directive is bypassed and the board simply holds that the actions of the contracting officer constitute the change order.⁴² The board, seeing an instance where the contracting officer should have taken or foregone a certain course of action, pursuant to a change order in compliance with the contractual duty to cooperate and not hinder performance, decides the case as if the change order had been issued. Actually what has happened is that the contracting officer has breached the contract.

The implementation of this theory in practice occurs where some act (or failure to act) of the Government causes the contractor to perform extra work. Rather than call this breach of contract, the boards will grant an equitable adjustment under the changes clause to pay for the extra

39. *Id.* at 336. See Spector, *Confusion in the Concept of the Equitable Adjustment in Government Contracts*, 22 Fed. B. J. 5, 10 n.23 (1962).

40. No. 259-59, Ct. Cl., May 15, 1964.

41. See *Volentine & Littleton v. United States*, 144 Ct. Cl. 723, 169 F. Supp. 263 (1959).

42. *E.g.*, *Noonan Constr. Co., A.S.B.C.A.* 8320, 1963 B.C.A. 18282, 18285.

work.⁴³ The classic instance occurs when the contracting officer requires work which is beyond the scope of the contract requirements⁴⁴ or has incorrectly interpreted the contract and demands of the contractor more than the specifications require. The ASBCA has stated:

This Board has consistently held that where the Government, by its interpretation of a contract, requires a contractor to furnish more materials and services than were required by the contract as written, such interpretation by the Government constitutes a change in the contract and that an equitable adjustment as provided for by the "Changes" article of the contract is proper.⁴⁵

The boards have decided that in certain cases they will ignore a contracting officer's breach of contract and resort to the fiction of a constructive change so that they may grant relief.

B. *Impossibility of Performance*

A further refinement and extension of the constructive change order is the adoption by the boards of the doctrine of impossibility of performance.⁴⁶ The boards have often found it possible to grant relief in such difficult situations when the contractor finds it cannot perform in the manner contemplated by the parties at the time the fixed-price supply contract was signed.⁴⁷ Though the result is always a constructive change order, the reason for granting one may be variously stated: antecedent impossibility,⁴⁸ intervening impossibility,⁴⁹ practical production impossibility⁵⁰ and beyond the state of the art.⁵¹ Sometimes the board will term the problem one of excusable delay,⁵² superior knowledge,⁵³ difficulty

43. E.g., Harding, A.S.B.C.A. 2477 (1955).

44. Aero Serv. Corp., A.S.B.C.A. 4249, 58-1 B.C.A. 6355 (1958).

45. Polan Indus., Inc., A.S.B.C.A. 3996-97, 4104-07, 5054-55, 58-2 B.C.A. 8086, 8189 (1958). Accord, Fansteel Metallurgical Corp., A.S.B.C.A. 1689 (1954) ("[S]uch interpretation by the Government amounts in reality to a change in the contract . . .").

46. See Cuneo & Crowell, *Impossibility of Performance—Assumption of Risk Or Act of Submission?*, 29 Law & Contemp. Prob. 531 (1964); Nash, *Impossibility of Performance*, Geo. Wash. Gov't Contracts Monograph, No. 4 (1962); Pettit, *Impossibility of Performance*, Briefing Papers, No. 63-1, Gov't Contractor (1963).

47. See, e.g., F. J. Stokes, A.S.B.C.A. 6532, 1963 B.C.A. 19530.

48. Union Elec. & Mfg. Co., A.S.B.C.A. 3811, 58-2 B.C.A. 8014 (1958).

49. Gittlin Bag Co., A.S.B.C.A. 1136 (1953), wherein the Board, quoting extensively from the Restatement, Contracts §§ 457, 461 (1932), sustained an appeal on the basis of "supervening impossibility."

50. Pastushin Indus., Inc., A.S.B.C.A. 7663, 1963 B.C.A. 18735; National U.S. Radiator Corp., A.S.B.C.A. 3972, 59-2 B.C.A. 11060 (1959); Robbins Mills, Inc., A.S.B.C.A. 2255 (1956).

51. L & O Research & Dev. Corp., A.S.B.C.A. 3060, 57-2 B.C.A. 5310 (1957).

52. E. L. Cournand & Co., A.S.B.C.A. 2955, 60-2 B.C.A. 14731 (1960).

53. F. J. Stokes Corp., A.S.B.C.A. 6532, 1963 B.C.A. 19530.

not contemplated by the parties,⁵⁴ or defective⁵⁵ or conflicting⁵⁶ specifications.

Again, by a more conservative approach preoccupied with form, these situations could be categorized as breach of contract and, therefore, placed beyond the jurisdiction of the board. But the boards chose to adopt the more imaginative approach of a constructive change declaring that the contracting officer should have issued a change order at the time the contract was awarded affording relief from the requirement of impossibility. A few examples of such cases will impart their flavor.

In *Robbins Mills, Inc.*,⁵⁷ the board allowed recovery for practical production impossibility. The contractor, a textile manufacturer, was required to furnish a large quantity of nylon cloth having specified ballistic properties. The contractor was unable, on a consistent basis, to produce nylon cloth of the specified maximum weight which would meet the required ballistic tests. In finding that the contractor was entitled to an equitable adjustment for the additional costs which it incurred in producing acceptable nylon cloth, the board determined that the specified maximum cloth weight limitation created a problem of practical production impossibility. To effect the desired relief, the board employed its constructive change technique, finding that a change order relaxing the cloth weight limitation should have been issued at the time the contract was awarded.⁵⁸

In *L & O Research & Dev. Corp.*,⁵⁹ the contractor was unable to meet the contract performance requirements for a computer which it had contracted to develop, despite extensive development efforts. The board found the performance specifications impossible to achieve and granted relief. In a later appeal on the same issue and under the same contract, the board discussed the method of granting administrative relief—the constructive change order.

In our opinion it follows from that impossibility that the appellant is entitled to the issuance of a change order, as of the date of the contract, modifying the requirements for the range of input data, the degree of accuracy, or both, in such a manner that

54. *Globe Crayon Corp.*, A.S.B.C.A. 1496 (1954).

55. *J. W. Hurst & Son Awning, Inc.*, A.S.B.C.A. 4167, 59-1 B.C.A. 8947 (1959).

56. *Seaview Elect. Co.*, A.S.B.C.A. 6066, 61-2 B.C.A. 16363 (1961).

57. A.S.B.C.A. 2255 (1956).

58. "In our opinion the facts of this appeal require that a change order be issued. The maximum weight per square yard as fixed by the contract at 14.25 ounces was too low. . . . We find that the contractor was entitled to a weight relaxation at the time the contract was awarded, and that a change order should have been issued. . . . We direct the issuance of a change order as indicated above." *Id.* at 14. (Emphasis omitted.)

59. A.S.B.C.A. 3060, 57-2 B.C.A. 5310 (1957).

it would be possible to produce a computer which was capable of converting the data received with an attainable degree of accuracy.⁶⁰

In one of its most quoted impossibility of performance decisions, *J. W. Hurst & Son Awnings, Inc.*,⁶¹ the board found that the government specifications for the tents to be manufactured by the contractor were defective; and, on the basis of a constructive change, it allowed the contractor the additional costs which it incurred as a result of the inefficiency and extra work caused by the defective specifications.⁶² Again, in *F. J. Stokes Corp.*,⁶³ the board speaks in terms of defective specifications in declaring: "In decisions too numerous to cite this Board has held that faulty or defective specifications making performance impossible may give rise to a claim for price adjustment under the Changes clause."⁶⁴

Perhaps the best statement of the doctrine is contained in a recent decision by E. Riggs McConnell, a Hearing Examiner for the Atomic Energy Commission. In *Fenco-Polytron*⁶⁵ the Examiner states:

The most usual ground for relief is a "constructive change order" under the changes clause. In theory it is found that a change order should have been issued at the inception of the contract modifying the specifications in such a way that it would be possible to perform. The equitable adjustment includes the cost entailed in the effort to attain the impossible. . . .

To "grasp the thistle by the nettle" it must be admitted that under any circumstances the doctrine of "constructive change order" is based on a fiction which not only runs into the teeth of the language of the change clause itself, but also the court cases construing the clause. To extend the doctrine so that it applies *nunc pro tunc* to the inception of the contract and allow recovery of the costs of the effort to attain the impossible, compounds the fiction and goes to the outer bounds of logic. . . .

60. A.S.B.C.A. 5013, 59-1 B.C.A. 9018, 9020 (1959).

61. A.S.B.C.A. 4167, 59-1 B.C.A. 8947 (1959).

62. That section of the *J. W. Hurst* decision so frequently quoted in impossibility decisions is: "When the Government contracts for supplies to be manufactured in accordance with Government specifications, ordinarily there is an implied warranty on the part of the Government that, if the specifications are followed, a satisfactory product will result. . . . Faulty design and mistakes in specifications causing extra work have been held to provide a basis for price adjustment under the "Changes" clause . . . even though the change constituted a relaxation of the specifications to achieve an attainable result. . . . We are of the opinion that this appeal is governed by the principles there enunciated. . . . Where, as here, the change is necessitated by defective specifications and drawings, the equitable adjustment to which a contractor is entitled must, if it is to be equitable, i.e., fair and just, include the costs which it incurred in attempting to perform in accordance with the defective specifications and drawings. . . . Under these circumstances the equitable adjustment may not be limited to costs incurred subsequent to the issuance of the change orders." *Id.* at 8964-65.

63. A.S.B.C.A. 6532, 1963 B.C.A. 19530.

64. *Id.* at 19542.

65. A.E.C.B.C.A. 171 (1964).

Be this as it may, the doctrine of "constructive change order" is firmly ingrained in the law applicable to the settlement of claims under the disputes clause. See Cunco, *Government Contracts Handbook*, 50 (1962). There can be no doubt that it is a very sensible and practical instrument of doing justice in many situations. . . .

In conclusion, although the theoretical difficulties are substantial indeed, it is felt that the cases holding that the various boards and hearing examiners can dispose of the impossibility cases under the disputes procedure are practically sound. In the end, probably the best resting ground is Justice Holmes' dictum: "The life of the law has not been logic: it has been experience."⁶⁶

The boards decisions adopting a constructive change theory in impossibility of performance situations is a major step in achieving parallel jurisdiction with the Court of Claims. By imaginative legal reasoning the boards now take jurisdiction over those cases which under other circumstances could not be considered as disputes arising under the contract.

The Court of Claims, however, need not resort to any theory such as a constructive change order. It exercises a parallel jurisdiction. The court generally speaks in terms of mutual mistake of a material fact or implied warranty of the specifications⁶⁷ or faulty or misleading specifications.⁶⁸ It will also occasionally equate extreme hardship with impossibility.⁶⁹ In *Dillon v. United States*,⁷⁰ the court granted partial relief because of unusual circumstances not contemplated by the parties.⁷¹

*R. M. Hollingshead Corp. v. United States*⁷² is generally considered to be the leading case of actual, objective, antecedent, or "specification" impossibility. In that case the plaintiff agreed to supply a certain quantity of twenty-five per cent DDT concentrate in five-gallon metal drums. The concentrate was required by the contract to remain clear and not become cloudy for a period of one year under certain conditions. Because of the interaction of the concentrate and the metal of the containers, the liquid rapidly lost its clear color and became cloudy. Neither party knew at the time the contract was signed that the specifications

66. Id. at 30-32 (slip opinion).

67. See *R. M. Hollingshead Corp. v. United States*, 124 Ct. Cl. 681, 111 F. Supp. 285 (1953).

68. See *Helene Curtis Indus., Inc. v. United States*, — Ct. Cl. —, 312 F.2d 774 (1963).

69. See *Dillon v. United States*, 140 Ct. Cl. 508, 156 F. Supp. 719 (1957); *Mitchell Canneries, Inc. v. United States*, 111 Ct. Cl. 228, 77 F. Supp. 498 (1948).

70. *Supra* note 69.

71. In *Dillon*, the contractor sued for the excess costs it incurred in successfully performing a contract to deliver hay to the government in Oklahoma. Because of a severe drought in the area, plaintiff was unable to secure the hay required. Plaintiff repeatedly requested release from its obligations; the government repeatedly insisted on full performance. Hay was ultimately obtained by plaintiff from Nebraska at a much greater cost.

72. 124 Ct. Cl. 681, 111 F. Supp. 285 (1953).

requiring a metal container and the specification requiring clear color after storage could not both be met. This, therefore, presented a clear case of "objective impossibility."

Plaintiff sued for the contract price of 28,428.15 dollars. The Government had withheld amounts otherwise due on the contract on the basis that plaintiff corporation had failed to comply with the contract specifications. In denying the Government's motion to dismiss, the Court of Claims stated: "[I]t would be a rare instance when the supplier could reasonably be expected to investigate for himself whether compliance with the specifications would, in fact, produce the desired result."⁷³

The boards and the Court of Claims now have parallel jurisdiction over cases involving impossibility of performance. Therefore, review by the court of board decisions under the doctrine of *Bianchi* grants to the contractor his speedy administrative remedy⁷⁴ and at the same time preserves the necessary safeguard of a judicial review.

C. Acceleration

The boards' concept of acceleration of performance also illustrates the operation of the constructive change order.⁷⁵ By means of practical reasoning, the administrative boards have treated government orders to speed up the performance of a contract as changes under the standard changes clause,⁷⁶ thus providing the contractor with a contractual right to an equitable adjustment for the cost of accelerating performance. For the mind attuned only to formalistic legal concepts, this is not an easy proposition. Assumption of jurisdiction by the administrative boards is impeded by two conceptual obstacles. First, where there is an actual

73. *Id.* at 683-84, 111 F. Supp. at 286.

74. See Shedd, *Disputes and Appeals: The Armed Services Board of Contract Appeals*, 29 *Law & Contemp. Prob.* 39, 40 (1964).

75. Creyke & Bixler, *Constructive Acceleration Under Government Contracts*, 29 *Law & Contemp. Prob.* 137 (1964); Ribakoff, *Acceleration, Briefing Papers*, No. 64-3, *Gov't Contractor* (1964).

76. Changes, *Armed Services Procurement Reg.* 7-103.2, 32 C.F.R. § 7.103-2 (1961), as amended, 32 C.F.R. § 7.103(2) (Supp. 1964) (supply); *Armed Services Procurement Reg.* 7-602.3, 32 C.F.R. § 7.602-3 (Supp. 1964) (construction).

The latter clause states in part: "The Contracting Officer may at any time, by a written order, and without notice to the sureties, make changes, within the general scope of this contract, in any one or more of the following: (i) Drawings, designs, or specifications, where the supplies to be furnished are to be specially manufactured for the Government in accordance therewith; (ii) method of shipment or packing; and (iii) place of delivery. If any such change causes an increase or decrease in the cost of, or the time required for the performance of any part of the work under this contract, whether changed or not changed by any such order, an equitable adjustment shall be made in the contract price or delivery schedule, or both, and the contract shall be modified in writing accordingly."

change order directing the contractor to speed-up, there is the difficulty of fitting changes in the time for performance within the language of the changes clause. The standard form changes clauses make no direct reference to time for performance.⁷⁷ Second, the boards are frequently presented with appeals by contractors who were compelled to accelerate not by an explicit written order of the contracting officer, but by collateral actions and directives.⁷⁸ Here, there is an additional problem of finding a written or at least an actual change order. Both of these obstacles provoke the same basic question: Does the contract provide a remedy, or are these cases which sound only in breach of contract?

By devising practical means of escaping the impractical limitations of the changes clause, the boards have asserted jurisdiction and provide administrative relief under the contract clauses. Although neither of the standard changes clauses contains a specific provision allowing a unilateral change in time for performance, the boards have recognized the Government's authority to demand a speed-up of the contract work. At the same time, the contractor has been permitted the attendant remedy, outside of the Court of Claims, for the added costs resulting from the unilateral modification. Toward this desirable end, the boards have simply given a broad interpretation to the changes clause. Where the performance schedule is included in the specifications, the boards have found it easy to conclude that time changes are incorporated in the clause by its direct reference to the specifications.⁷⁹ Even when the schedule is not in the specifications and the changes clause does not cover changes in schedule, acceleration claims have been allowed under the changes clause.⁸⁰

When the obstacle has been the absence of the required "written order" demanding acceleration, the boards have permitted equitable adjustment of the contract. Appeals presenting this difficulty occur when the contractor is excusably delayed and the Government refuses to grant a time extension, insisting on the original schedule. These facts immediately prompt two conclusions: (1) refusal to grant extensions for excusable

77. *Ibid.*

78. E.g., *Electronic & Missile Facilities, Inc.*, A.S.B.C.A. 9031, 1964 B.C.A. ¶ 4338; *Mechanical Util., Inc.*, A.S.B.C.A. 7435, 7466, 1962 B.C.A. 18025.

79. *Melrose Waterproofing Co.*, A.S.B.C.A. 9058, 1964 B.C.A. ¶ 4119; *Leo Sanders*, B.C.A. 1468, 4 C.C.F. 50891 (1948); *Samuels & Gundling*, B.C.A. 1147, 4 C.C.F. 51237 (1949). The Comptroller General had also indicated that the time for performance could be changed under the changes clause when the schedule is found in the specifications. 41 Dec. Comp. Gen. 436 (1962). Recently, however, his office has noted that the supply contract changes clause does not admit of such an interpretation. Comp. Gen. Dec. B-149895, Oct. 1, 1963, 9 C.C.F. ¶ 72288.

80. E.g., *Ensign-Bickford Co.*, A.S.B.C.A. 6214, 60-2 B.C.A. 14553 (1960).

delays is a breach of contract;⁸¹ and (2) there is no written change order requiring acceleration.⁸² Given these conclusions, a contract remedy and accompanying board jurisdiction seem out of reach.

The boards have taken a more realistic view. By probing deeper, they perceive a third conclusion. The Government's refusal to extend presents the contractor with the dubious option of (1) not accelerating and risking a default termination (or liquidated damages) for delinquency, or (2) accelerating at his own expense.⁸³ To relieve the contractor of this intolerable dilemma, the boards asserted their jurisdiction. They did so by abandoning legal niceties. They simply recognized that the contracting officer's actions, as indicators of the Government's desires or by virtue of their coercive effect on the contractor, were tantamount to the "written order" required by the changes clause.⁸⁴

For example, in the appeal of *Standard Store Equip. Co.*,⁸⁵ the Government failed to make the site available to the contractor on schedule. The contractor was excusably delayed by this delinquency, but the Government refused to grant time extensions and insisted upon the original completion dates. The ASBCA made it clear, first, that the order need not be in writing to satisfy the changes article. Then the board decided that, when the contractor had a right to time extensions, the refusal to extend and accompanying insistence on the original schedule were the equivalent of a change order to accelerate.

Unfortunately, recovery under this doctrine is not without its difficulties. Although the principle of the constructive acceleration order is safely established, the boards have recently displayed a tendency to encumber its practical doctrine with formal prerequisites. In the case of supply contracts, the ASBCA has established the questionable requirement that the contractor actually request an extension of time, even though the Government knows of the excusable delay and has indicated that it will grant no extensions.⁸⁶ It is hoped that this rule does not

81. The contractor may not treat it as a breach, however, because denial of a time extension is appealable under the disputes clause.

82. As has been indicated, the standard changes clause speaks in terms of such an order. See note 76 supra.

83. Both of these risks are often involved in construction contracts, and occasionally in supply contracts. See the following clauses: Termination for Default-Damages for Delay-Time Extensions, Armed Services Procurement Reg. 8-709, 32 C.F.R. § 8.709 (Supp. 1964) (construction); Default, Armed Services Procurement Reg. 8-707, 32 C.F.R. § 8.707 (Supp. 1964) (supply); Liquidated Damages, Armed Services Procurement Reg. 7-105.5, 32 C.F.R. § 7.105-5 (1961) (supply).

84. E.g., *Electronic & Missile Facilities, Inc.*, A.S.B.C.A. 9031, 1964 B.C.A. ¶ 4338.

85. A.S.B.C.A. 4348, 58-2 B.C.A. 7681 (1958).

86. *Aero Corp.*, A.S.B.C.A. 7920, 8237, 1964 B.C.A. ¶ 4268.

apply to construction contracts, since under those provisions the contractor need only give notice of an excusable delay to establish his right to an extension. The terms of the contract itself do not require a request.⁸⁷ The boards have also indicated that the Government must not only refuse to grant an extension, but must also take the additional step of insisting on the original performance schedule. As a practical matter, the second step is redundant and without effect, but there are strong indications that a crucial legal effect may be attributed to an additional act.⁸⁸

Despite these indications of rigidity, the boards have by no reason abandoned the basic principle of constructiveness. A written, explicit insistence on the original schedule is not required. Some "direct action,"⁸⁹ such as a threat of default termination,⁹⁰ the imposition of liquidated damages,⁹¹ or "actions and course of conduct" showing that the Government was "prepared to do whatever was necessary to see to it that the original progress schedule was adhered to . . ."⁹² will satisfy the boards. In those cases where the boards find that all the necessary elements are present, they then retroactively term the contracting officer's actions a constructive acceleration order.

Thus the principle of acceleration reflects two efforts by the boards to expand jurisdiction. In the first place, they have placed changes in time for performance within a broad interpretation of the changes clause. In the second place, they have, through the application of the constructive change order concept, found the existence of an acceleration order, where in a narrow, formal sense no order was made. By virtue of this sensible and practical adjudication, the boards have achieved a fundamental equity under the contract.

No cases have been found where the Court of Claims uses the specific word acceleration. It would be more likely to speak in terms of breach of duty to cooperate or similar language.⁹³ In *Kirk v. United States*,⁹⁴ the court awarded a contractor extra costs incurred because the contracting officer erroneously refused to grant an extension of time under the contract forcing the contractor to carry on construction activities during the winter months. A close analysis of the case reveals, however,

87. Termination for Default-Damages for Delay-Time Extensions, Armed Services Procurement Reg. 8-709, 32 C.F.R. § 8.709 (Supp. 1964) (construction).

88. Carroll Servs., Inc., A.S.B.C.A. 8362, 8363, 1964 B.C.A. ¶ 4365 (dictum).

89. Olin Mathieson Chem. Corp., A.S.B.C.A. 7605, 1963 B.C.A. 19687.

90. Mechanical Util., Inc., A.S.B.C.A. 7435, 7466, 1962 B.C.A. 18025.

91. Keco Indus., Inc., A.S.B.C.A. 8900, 1963 B.C.A. ¶ 3891.

92. Electronic & Missile Facilities, Inc., A.S.B.C.A. 9031, 1964 B.C.A. ¶ 4338.

93. See, e.g., *Commerce Int'l Co. v. United States*, No. 287-55, Ct. Cl., Oct. 16, 1964; *Volentine & Littleton v. United States*, 144 Ct. Cl. 723, 169 F. Supp. 263 (1959).

94. 111 Ct. Cl. 552, 77 F. Supp. 614 (1958).

that the court is actually granting relief because of the contractor's acceleration.

IV. EXPANSION OF JURISDICTION BY THE ADDITION OF CONTRACT CLAUSES

In addition to the development of the theory of the constructive change, the boards have been aided in attaining the desired goal of parallel jurisdiction with the Court of Claims by means of three important clauses which are now contained in some government contracts, *i.e.*, the government-furnished property clause, the suspension of work clause and the modified changes clause. These clauses have meant that the boards now feel authorized to grant at least partial relief in the traditionally difficult area of government-caused interference and delay. Unfortunately, the boards have not utilized these clauses to the fullest extent with the result that significant gaps in jurisdiction continue to remain.

A. *The Government-Furnished Property Clause*

The government-furnished property clauses,⁹⁵ included in every contract for supplies and services where the Government is to furnish material, tooling or facilities to the contractor, specifically cover the situation where either defects in the property or delay in delivery cause the contractor harm.⁹⁶ In the absence of such a clause, this harm would be the basis of a breach of contract action; with the clause, the contracting officer may equitably adjust (1) the delivery dates, (2) the contract price, and (3) any affected contractual obligations because of such delays or defects. The decision is appealable. Moreover, according to the language of the clauses, these remedies are now exclusive and there can be no suit for breach of contract.⁹⁷ This does not prevent the Court of Claims from exercising parallel jurisdiction. It may grant, on review, an equitable adjustment rather than damages.⁹⁸

95. Armed Services Procurement Reg. 13-502, 32 C.F.R. § 13.502 (1961) (fixed price). Cost reimbursement contracts have a similar, more inclusive government property clause. Armed Services Procurement Reg. 13-503, 32 C.F.R. § 13.503 (1961).

96. See Goodwin, *Government-Furnished Property*, Geo. Wash. Gov't Contracts Monograph, No. 6 (1963).

97. Section (a) of both clauses ends with the following sentence: "The foregoing provisions for adjustment are exclusive and the Government shall not be liable to suit for breach of contract by reason of any delay in delivery of Government-furnished Property or delivery of such property in a condition not suitable for its intended use." Armed Services Procurement Reg. 13-502(a), -503(a), 32 C.F.R. §§ 13.502(a), .503(a) (1961).

98. *Topkis Bros. v. United States*, 155 Ct. Cl. 648, 297 F.2d 536 (1961).

While these clauses cover only one area of disputes, where the Government interferes with or delays performance or otherwise fails to live up to its duty to cooperate, nevertheless, they have broadened the jurisdiction of the boards to parallel that of the Court of Claims in the areas they cover.

B. *Suspension of Work Clause*

The suspension of work clause⁹⁹ may be included in fixed-price construction contracts. This clause was in part an outgrowth of the agitation following the decision of the Supreme Court in *United States v. Rice*,¹⁰⁰ which, in effect, declared that a contractor's recovery for government delays was limited to a time extension and that no money could be awarded.¹⁰¹

Under the original suspension of work clause, the contractor had the right to a price adjustment for unreasonable delay only when the Government *ordered* a total or partial suspension of work. However, by utilizing again the constructive change theory, the ASBCA declared a *de facto* suspension of work by the action (not order) of the contracting officer.¹⁰² Again, as in the constructive acceleration situations, the board needed to leap two hurdles to attain jurisdiction. The first hurdle was overcome by the suspension clause itself (previously, recovery for delay was available only in isolated cases under a breach of contract theory); the second hurdle was overcome by invoking a *de facto, nunc pro tunc* suspension, *i.e.*, a constructive suspension order.¹⁰³

The present suspension of work clause provides that whenever the contracting officer by written order or *actions* suspends, delays or interrupts the performance of the contractor for an unreasonable period of time, an adjustment in the contract price should be made. The board is given jurisdiction through the disputes clause. In situations where the contracting officer gives a restricted or partial notice to proceed,¹⁰⁴ or

99. Price Adjustment for Suspension, Delays, or Interruption of Work, Armed Services Procurement Reg. 7-604.3, 32 C.F.R. § 7.604-3 (1961).

100. 317 U.S. 61 (1942).

101. Three excellent articles discussing this area of recovery for government-caused delays have been written recently. See Clark, Government Caused Delays in the Performance of Federal Contracts: The Impact of the Contract Clauses, 22 Military L. Rev. 1 (1963); Shedd, The Rice Doctrine and the Ripple Effects of Changes, 32 Geo. Wash. L. Rev. 62 (1963); Speck, Delays-Damages on Government Contracts: Constructive Conditions and Administrative Remedies, 26 Geo. Wash. L. Rev. 505 (1958).

102. Basich Bros. Constr. Co., B.C.A. 1592 (1949); Guerin Bros., B.C.A. 1551 (1948). See also T. C. Bateson Constr. Co., A.S.B.C.A. 5492, 60-1 B.C.A. 12312 (1960); John A. Johnson Sons, A.S.B.C.A. 4403, 59-1 B.C.A. 8913 (1959).

103. T. C. Bateson Constr. Co., *supra* note 102, contains a good description of this development.

104. James Smyth Plumbing & Heating Co., A.S.B.C.A. 6098, 6632, 1962 B.C.A. 17519.

where the contracting officer fails to respond to a contractor's quotation for work under a needed change order,¹⁰⁵ or to a request for approval of materials to use in meeting a changed condition,¹⁰⁶ the board will grant relief under this new clause.¹⁰⁷

Where this clause is utilized, the boards may grant relief in those fact situations which would otherwise be declared as breaches of contract beyond their jurisdictions. But the suspension of work clause is not a mandatory clause and even when it is included, it only solves a portion of the parallel jurisdiction problem, *i.e.*, recovery is given only for unreasonable delay. It is, however, an important factor in a limited area resulting in the board's ability to consider, decide and grant relief in a situation which would otherwise be a breach of contract.

C. *The Modified Changes Clause*

The changes clause has always been one of those clauses which dramatically distinguishes a government contract from one between private parties.¹⁰⁸ Essentially, it permits the Government to make changes in the work during the period of performance.¹⁰⁹ These changes not only bring increased labor and material costs but often are accompanied by delays and interruptions of performance attendant with other increased costs. Under the changes clause used in construction contracts,¹¹⁰ and a similar clause which heretofore was used in supply contracts, an equitable adjustment is available for the labor and material costs caused by the structural change itself, and, any delay in performing the changed work; no recovery, other than a time extension, is given for the delay in performing the unchanged work which was caused by making the change.¹¹¹ Moreover, under this older clause the boards denied all jurisdiction over claims for costs of delays incurred while waiting to receive the change order and begin work.¹¹² However, the boards have occasionally given a broad interpretation of what constitutes changed work and

105. Brezner, A.S.B.C.A. 6207, 61-1 B.C.A. 15118 (1961).

106. Larco Painting Co., A.S.B.C.A. 6005, 60-1 B.C.A. 13209 (1960).

107. See also Aerodex, Inc., A.S.B.C.A. 7121, 1962 B.C.A. 17819.

108. See note 35 *supra* and accompanying text.

109. See note 76 *supra*.

110. Armed Services Procurement Reg. 7-602.3, 32 C.F.R. § 7.602-3 (1961); see note 76 *supra*.

111. This is the "Rice doctrine." *Rice v. United States*, 317 U.S. 61, 67 (1942); *Chouteau v. United States*, 95 U.S. 61 (1877).

112. See, e.g., *Maddox*, I.B.C.A. 248, 61-2 B.C.A. 16811 (1961); *Connolly-Pacific Co.*, A.S.B.C.A. 6745, 61-1 B.C.A. 15411 (1961); *Roscoe Eng'r Corp.*, A.S.B.C.A. 6193, 60-2 B.C.A. 13801 (1960); *Laburnum Constr. Corp.*, A.S.B.C.A. 5525, 59-2 B.C.A. 10426 (1959). These costs are commonly referred to as "standby costs."

in effect granted recovery for what appeared to be impact and delay costs attributable to the disruptive effect of the change on related work.¹¹³

The modified changes clause now found in fixed-price supply contracts clearly permits the recovery of the additional costs for disruption and delay caused by the change order to the unchanged work.¹¹⁴ Unfortunately, the boards have taken a narrow view of the extent of the modified clause and have stated that they still do not have jurisdiction to grant recovery of the costs incurred while awaiting a change order, *i.e.*, standby costs.¹¹⁵ Nevertheless, contractors are now receiving, under this modified clause, their additional costs of unchanged work affected by the change. Again the jurisdiction of the boards has been broadened by the addition of a new contract clause.

V. REMAINING GAPS IN PARALLEL JURISDICTION

The boards, therefore, have broadened their own jurisdiction by the use of the constructive change doctrine including the closely allied theories of impossibility of performance and acceleration. In addition, three important contract clauses now make possible administrative relief where none existed previously, *i.e.*, the government-furnished property clause, the suspension of work clause, and the modified changes clause. Both the clauses and the broad constructive change doctrine have helped to make the jurisdiction of the administrative boards more nearly parallel to that of the Court of Claims. There are still important areas, however, where the administrative boards refuse to take jurisdiction but where the contractor may obtain relief from the Court of Claims. The three most important of these areas are: government-caused delay and interference; the withholding of information by the Government; and Government misrepresentation.

A. Government-Caused Delay and Interference

The *Rice* doctrine¹¹⁶ allows no recovery for additional costs of or delay in, the performance of unchanged work and this has been relaxed only

113. See *Power Equip. Corp.*, A.S.B.C.A. 5904, 1964 B.C.A. ¶ 4025; *Northeastern Eng'r, Inc.*, A.S.B.C.A. 5732, 61-1 B.C.A. 15682 (1961); *Ivey Bros. Constr. Co.*, Eng'r B.C.A. 1764 (1960). See generally *Shedd*, supra note 101.

114. *Armed Services Procurement Reg. 7-103.2*, 32 C.F.R. § 7.103-2 (1961). The modified portion states: "If any such change causes an increase or decrease in the cost of, or the time required for the performance of any part of the work under this contract, whether changed or not changed by any such order, an equitable adjustment shall be made in the contract price or delivery schedule, or both . . ." See *Weldfab, Inc.*, I.B.C.A. 268, 61-2 B.C.A. 16205 (1961).

115. See *Compudyne Corp.*, A.S.B.C.A. 8018, 1962 B.C.A. 17892; *Weldfab, Inc.*, supra note 114.

116. See note 111 supra and accompanying text.

where the modified changes clause is employed. With respect to standby costs, the Court of Claims allows the Government only a reasonable period of time in which to decide on and issue a change order. Failure of the Government to act within a reasonable time renders it liable for damages for breach of the implied duty to cooperate and not to hinder performance.¹¹⁷ As just noted, however, the boards have construed their jurisdiction as denying them the authority to pay such standby costs.¹¹⁸

Not only will the ASBCA not provide relief in most instances of unreasonable delay incident to a change order, but also it has even refused to award delay costs when the contractor is delayed by the necessity of changing incorrect specifications,¹¹⁹ when the work site is not available,¹²⁰ when the Government delays in making inspections or in giving some required stamp of approval¹²¹ or in furnishing some needed materials.¹²²

In a few instances where the contracting officer orders a change in the rate or sequence of scheduled work and the schedule is contained in the specifications, the board has granted recovery for the extra costs caused thereby.¹²³ However, in most cases where government actions have caused delay, the boards will simply state that the action sounds in breach of contract and that, in the absence of a suspension of work clause, there is no jurisdiction to afford administrative relief. Similarly, in instances where government actions interfere with performance and make it more difficult, the boards constantly state that they have no

117. See *F. H. McGraw & Co. v. United States*, 131 Ct. Cl. 501, 130 F. Supp. 394 (1955); *J. A. Ross & Co. v. United States*, 126 Ct. Cl. 323, 115 F. Supp. 187 (1953); *Continental Ill. Nat'l Bank & Trust Co. v. United States*, 121 Ct. Cl. 203, 101 F. Supp. 755, cert. denied, 343 U.S. 963 (1952); *Anthony P. Miller, Inc. v. United States*, 111 Ct. Cl. 252, 77 F. Supp. 209 (1948).

118. See notes 112 & 115 supra.

119. *J. W. Bateson Co., A.S.B.C.A. 5958*, 1962 B.C.A. 16980 (delay pending correction in specifications or approval of deviation). The costs of trying to perform under the incorrect specifications are recoverable under the changes clause (impossibility—construction change). See also *J. W. Hurst & Son Awnings, Inc., A.S.B.C.A. 4167*, 59-1 B.C.A. 8947 (1959).

120. See *George L. Fuller Constr. Co., A.S.B.C.A. 5617*, 59-2 B.C.A. 11235 (1959). But see *Todd Shipyards Corp., A.S.B.C.A. 649-50* (1951).

121. See *Poudreries Reunies de Belgique, S.A., A.S.B.C.A. 8203*, 1963 B.C.A. 18478; *Model Eng'r & Mfg. Corp., A.S.B.C.A. 7490*, 1962 B.C.A. 17307; *Simmel-Industrie Meccaniche Societa, Per Azioni, A.S.B.C.A. 6141*, 61-1 B.C.A. 15229 (1961); *Craig Instrument Corp., A.S.B.C.A. 6385*, 61-1 B.C.A. 14989 (1961).

122. See *Martin K. Eby Constr. Co., I.B.C.A. 355*, 1963 B.C.A. 18392, 18393, where the board made the unfortunate statement that "a contract obligation is not a matter for administrative adjustment under the Changes clause." Accord, *Commonwealth Elec. Co., I.B.C.A. 347*, 1964 B.C.A. ¶ 4136.

123. *Hill & Moore Constr. Co., A.S.B.C.A. 8187*, 1963 B.C.A. 18523; *George E. Detzel Co., A.S.B.C.A. 5852*, 61-2 B.C.A. 16319 (1961); *Armour Lab., A.S.B.C.A. 2721* (1955).

jurisdiction because these actions sound in breach of contract.¹²⁴ In refusing to find a way to grant relief through the use of a constructive change order to bring acts of the contracting officer under the changes clause (as it did with acceleration, impossibility and erroneously required work), the board is narrowing its jurisdiction and failing to give the contractor any administrative bite at the apple at all.

The efforts to draw distinctions between what actions must be considered solely as breach of contract (outside the boards' jurisdiction) and what actions may be considered as constructive changes (within the boards' jurisdiction) is causing NASA Board of Contract Appeals much trouble. In *G. A. Karnavas Painting Co.*¹²⁵ that board refused to hear a claim for excess costs due to government acts of delay and interference, but granted recovery under the constructive change theory where the contractor was required to perform extra work both by erroneous interpretations of the specifications and by excessive acts of supervision and inspection. Then, in *Carpenter Constr. Co.*,¹²⁶ when the Government had delayed in making the site available, the board progressed to the point of granting recovery of those extra costs incurred because the contractor had to do piecemeal work whenever the site was free of other contractors.

124. See *Electric Properties Co.*, I.B.C.A. 443-5-64, 1964 B.C.A. ¶ 4415; *G. O. General Contracting Corp.*, A.S.B.C.A. 8972, 1964 B.C.A. ¶ 4323; *Haddock & Beck*, A.S.B.C.A. 7742, 1962 B.C.A. 17750.

125. N.A.S.A.B.C.A. 28, 1963 B.C.A. 18261.

126. N.A.S.A.B.C.A. 18, 1964 B.C.A. ¶ 4452. The board required approximately three years to decide this case. The dissent contains an excellent statement on administrative board jurisdiction.

I am satisfied from the foregoing that the appeal states a case upon which relief can be granted with respect to all standby costs incurred by Appellant which are provable and otherwise proper to be taken into account in making an equitable adjustment. I think this Board has jurisdiction to grant the relief as an equitable adjustment under the "Changes" clause because there was a change from the date of availability set forth in the specifications to some later date.

Since the subject of our jurisdiction is moot under the holding of the majority opinion, I will not further labor this dissenting opinion with my rationale for sustaining jurisdiction other than to cite *Melrose Waterproofing Company*, ASBCA No. 9058, 31 January 1964, 1964 BCA ¶ 4119; *Mishara Construction Company, Inc.*, ASBCA No. 8532, 17 April 1964, 1964 BCA ¶ 4195; and Comptroller General decisions 41 Comp. Gen. 436 and B-150093, 19 November 1962. The adverse decision of the Comptroller General, B-149895 dated 1 October 1963, was directed to Standard Form 32 which is not involved in this case.

Likewise, if liability in this case could not be compensated by an equitable adjustment for a "change" from one date in the specification to another date because the failure of the Government were to be considered an unreasonable delay resulting in breach of contract, I would also hold that this Board could take jurisdiction to grant the appropriate relief under the "Disputes" clause of the contract taken with an implied provision of the contract to compensate the contractor in such event. I have, in the preparation for this case, prepared a 750 page study of the question of jurisdiction of boards of contract appeals of breach of contract cases, and concluded that if a board has jurisdiction to decide questions of law, even though a decision on such a question is not final and conclusive, it can also decide breach of contract cases involving claims for standby costs.

Id. at 21433-34.

The board refused, however, to find a way to permit recovery for the pure delay costs incurred by virtue of the fact that this piecemeal work resulted in the contractor's working fourteen months longer than was contemplated in the schedule. The contractor, therefore, is still faced with no administrative recovery for unreasonable delays (absent a suspension of work clause) and also for government actions which interfere with the performance of the work.

B. *Withholding Information*

Completely unrelated to the delay or interference situations are those instances where the Government fails to provide the contractor with all of the information which it knows (or should know) is needed by the contractor in order to correctly prepare its bid. This failure clearly constitutes breach of contract,¹²⁷ and jurisdiction is accordingly declined by the boards. However, this situation should be viewed by the boards just as they view impossibility cases. The boards should retroactively provide the information at the crucial time and grant the contractor an equitable adjustment under the changes article for the additional costs incurred as a result of withholding the information.

The ASBCA has managed to grant relief for delays under the suspension of work clause where the Government put out specifications which it knew were defective and issued a notice to proceed when it knew that its supplier of H-piles could not deliver in time for the contractor to meet the schedule.¹²⁸ It has also provided a remedy under the changed conditions clause where the Government withheld information pertaining to subsurface conditions.¹²⁹ Only recently, however, the board denied jurisdiction to hear a claim under the changes clause. The alleged cause of the extra costs was the Government's failure to inform bidders that government-owned aggregate, to be used in making concrete, needed a special antistripping agent. Counsel for the appellant made the unfortunate mistake of mentioning breach of duty and the ASBCA seized on this handle with alacrity to turn off its jurisdiction.

Without passing on the facts as alleged, the theory of the case [breach of the duty to disclose] appears to be properly stated by counsel. On the other hand, the Board

127. See *Helene Curtis Indus., Inc. v. United States*, 312 F.2d 774 (Ct. Cl. 1963); *Snyder-Lynch Motors, Inc. v. United States*, 154 Ct. Cl. 476, 292 F.2d 907 (1961); *Baton-Stolte, Inc. v. United States*, 145 Ct. Cl. 387, 172 F. Supp. 454 (1959). The only prerequisite is that the contractor actually be misled to his detriment. See *Leal v. United States*, 149 Ct. Cl. 451, 276 F.2d 378 (1960); *Ivy H. Smith Co. v. United States*, 154 Ct. Cl. 74 (1961).

128. *S. Patti Constr. Co., A.S.B.C.A. S243*, 1964 B.C.A. ¶ 4225. The board acknowledged a "breach" situation.

129. *United Contractors, A.S.B.C.A. 6142*, 1962 B.C.A. 17060.

has no administrative authority to review claims for damages arising either under alleged breach of implied obligation of contract or for misrepresentation by silence when there is a duty to speak.¹³⁰

Withholding of information by the Government is not usually considered within the jurisdiction of the administrative boards. Here is, then, another important gap in parallel jurisdiction, and another bite is missing from the apple.

C. *Misrepresentation*

Very much akin to the instances of withholding information are those where there is an actual misrepresentation.¹³¹ A typical case is one where the Government, in the process of selling surplus property, wrongly described a "sprocket chain" as a "roller chain." The matter was referred to the Comptroller General who decided that the contract could not be rescinded. On appeal to the board, following these actions and a default termination, the board could find no way to make an adjustment and concluded that the appellant was seeking rescission which is beyond the board's power.¹³² This result is entirely consistent; misrepresentation cases are inevitably dismissed as being beyond the board's jurisdiction.

While the Board does not have jurisdiction to make a determination of liability in case of breach of contract or to reform a contract, the Board does have jurisdiction to examine the evidence and determine whether such evidence supports a conclusion of misrepresentation. If the evidence establishes misrepresentation prior to acceptance of contract the appellant must still seek relief in some other forum.¹³³

In these cases the boards do not mention the doctrine of constructive change orders. No effort is made to do by a constructive change that which should have been done and can be done in the Court of Claims. A similar result was reached in another recent case where the contractor complained that certain fluids had been left in the production lines rather than being drained, as he had been informed would be done prior to bidding. The board said only that: "This Board has repeatedly held that cases which sound in tort or purely in breach of contract are beyond its authority to adjust."¹³⁴

130. *M. M. Sundt Constr. Co.*, A.S.B.C.A. 10246, 1964 B.C.A. ¶ 4423 at 21314-15.

131. See, e.g., *Industrial Salvage Corp. v. United States*, 122 Ct. Cl. 611 (1952).

132. *Groban Supply Co.*, A.S.B.C.A. 9310, 1964 B.C.A. ¶ 4258. Apparently, the president of the appellant appeared pro se. Perhaps, a different approach and advocacy couched in the proper terms would have brought a different result.

133. *Metrig Corp.*, A.S.B.C.A. 8455, 1963 B.C.A. 18340, 18341; accord, *Paul W. Speer, Inc.*, A.S.B.C.A. 7792, 1962 B.C.A. 17716; *Star Woolen Co.*, A.S.B.C.A. 5917, 59-2 B.C.A. 11704 (1959).

134. *Lenoir Wood Finishing Co.*, A.S.B.C.A. 7950, 1964 B.C.A. ¶ 4111, at 20061.

Instead of exercising imaginative legal reasoning, the boards have been content to echo the old refrain—where there is misrepresentation, there can be no administrative relief. But if the *Bianchi* case presupposes an administrative hearing and an administrative record, with the Court of Claims limited to a more restrictive appellate role, then there should be parallel jurisdiction, with the administrative boards being able to hear, decide, and grant relief under all situations where the Court of Claims may act.

VI. THE SUCCESS OF THE COURT OF CLAIMS

It is essential that those institutions charged with the responsibility of adjudicating disputes arising under government contracts (whether the Court of Claims or the administrative boards) retain a flexibility and capacity to grow which will allow these institutions to meet the challenges of the increasingly complex multi-billion dollar procurement programs of the federal government. Unfortunately the administrative boards have lagged far behind the Court of Claims in this regard. The Court of Claims has often granted relief in those situations which, by any equitable yardstick, require it.¹³⁵ In *Dillon v. United States*¹³⁶ the court declared: "But in extraordinary cases where extreme hardship, unforeseen and not contemplated by either party, would necessarily result, a measure of relief may be granted if the unusual circumstances justify such action. This is the very essence of equity, which is the peculiar product of English and American jurisprudence."¹³⁷

This philosophy is still adhered to today. In *National Presto Indus., Inc. v. United States*,¹³⁸ decided on October 16, 1964, the court was faced with difficult problems in the areas of mutual mistake and assumption of risk. The court granted relief "though the particular result here may be unprecedented that is, of course, the way of the common law."¹³⁹ The court later declared, "Reformation, as the child of equity, can mold its relief to attain any fair result within the broadest perimeter of the charter the parties have established for themselves."¹⁴⁰

In the problem area of assumption of risk, the court states that since neither party could be said to have assumed the risk of what actually happened,¹⁴¹ that it would be just to divide the additional costs between

135. See Ellison, *United States Court of Claims: Keeper of the Nation's Conscience for One Hundred Years*, 24 *Geo. Wash. L. Rev.* 251 (1956).

136. 140 Ct. Cl. 508, 156 F. Supp. 719 (1957).

137. *Id.* at 513, 156 F. Supp. at 723.

138. No. 370-58, Ct. Cl., Oct. 16, 1964.

139. *Id.* at 17 (slip opinion).

140. *Id.* at 19 (slip opinion).

141. *National Presto Indus., Inc. v. United States*, No. 370-58, Ct. Cl., Oct. 16, 1964,

the two parties.¹⁴² The court then said, "It is at least equally logical and decidedly more just to divide the cost between the two parties, neither of whom can be properly charged with the whole. We are rightly admonished, in the region of mutual mistake, to seek just solutions. By the same token we need not be stopped short by fear of opening Pandora's box."¹⁴³

The Court of Claims has never considered it essential to compartmentalize relief between breach of contract (outside the contract) and equitable adjustment (within the contract).¹⁴⁴ Such refusal to place

involved a factual situation where the contractor agreed with the Government to produce 105 millimeter mortar shells by a new process. The contractor was to propose the facilities to be used and the Government would purchase them, in addition to paying a fixed price for the shells. After production of a limited number of shells finally got underway, the contractor discovered that the shells required an additional manufacturing step—turning on lathes. Eventually, the Government furnished the lathes and production was completed, but the contractor sustained a large loss trying to produce the shells without turning. The Court of Claims denied the first claim based on breach of warranty to provide adequate facilities because the contractor had prepared the list of facilities provided by the Government and the Government had made no warranties in the fixed-price contract nor did it possess superior knowledge. The second claim was based on mutual mistake: Not that the written contract failed to conform to the understanding of the parties, but that neither party knew a turning process would be required or that it would take so long to discover this fact. The court found this to be the case and, further, that (1) the contract did not place the risk of such an occurrence on either party and (2) the Government would have agreed to make the change and bear some or all of the expense if it had known of the difficulty at the outset. Affirmative relief (reformation—Government to pay half the excess costs) was granted rather than rescission.

142. The court has partially adopted the method of analysis of practical production impossibility situations suggested by Cuneo & Crowell, *Impossibility of Performance: Assumption of Risk or Act of Submission?*, 29 *Law & Contemp. Prob.* 531, 550-51 (1964).

143. *National Presto Indus., Inc. v. United States*, No. 370-58, Ct. Cl., Oct. 16, 1964, at 18.

144. In *Fox Valley Eng'r, Inc. v. United States*, 151 Ct. Cl. 228, 241 (1960), the court reversed the ASBCA's refusal to grant an equitable adjustment and stated that the defendant's failure "to accept Lots 9, 10, and 11 was a breach of contract."

In *Potashnick v. United States*, 123 Ct. Cl. 197, 105 F. Supp. 837 (1952) the Government gave the contractor erroneous and misleading information on the boring data drawing on which he relied when making his bid. The court found this to be misrepresentation and a breach of warranty. Interestingly enough, the Government argued that the claim should have been brought under the Changed Conditions clause. The court, after noting that it did not feel that the clause was applicable, went on to say it saw no reason why the ability to present a claim under the clause precludes recovery in the Court of Claims on breach of contract.

In *Bruce Constr. Corp. v. United States*, — Ct. Cl. —, 324 F.2d 516, 519 (1963) the court said of the Supreme Court's decision in *United States v. Callahan Walker Constr. Co.*, 317 U.S. 56 (1942): "Though the Supreme Court was dealing only with the question of administrative remedies [equitable adjustment] provided in the contract, there is no question but that the decision points to application of a 'reasonable cost' test in determining damages [breach of contract]."

theories of recovery in separate and distinct slots is not to be criticized but to be praised if the court is interested, as it should be, in achieving the "essence of equity."

Many of the problems which have been mentioned in preceding sections have been solved by the court's impressing upon the Government the broad duty to cooperate and not to hinder performance. More recently this has become "breach of the Government's obligation of reasonable cooperation," breach of its "duty to share information" or simply "inconsiderate conduct."¹⁴⁵

In *Arcole Midwest Corp. v. United States*,¹⁴⁶ the court dealt with a situation where the Government misrepresented that a certain local source of electric power would be available. Two boards of contract appeals refused relief under the contract. Without mentioning breach of contract, the court simply said that the contractor has a right to rely on positive statements made by the Government.

In *Bateson-Stolte, Inc. v. United States*,¹⁴⁷ the Government had awarded plaintiff a large contract without informing the contractor that another agency was awarding another large contract in the same area. The award of the second contract would require an even larger work force and substantially increase the wages which plaintiff would have to pay in order to obtain labor. The court held that if the Government agency which awarded the contract to plaintiff knew these facts, then "good faith required the defendant to apprise the plaintiff thereof."¹⁴⁸ The same is true where the Government conceals or fails to disclose information about subsurface conditions.¹⁴⁹ But the court does not insist on pointing to a specific contract clause which was breached; the broad duty to cooperate and to share information are sufficient.

The relation between misleading statements and misleading silence is emphasized in the leading case in the latter area, *Helene Curtis Indus., Inc. v. United States*.¹⁵⁰ There the Government asked the contractor for

145. The court has gone so far as to indicate that relief would be granted where the Government is guilty of deliberate harassment and dilatory tactics even though the contractor finished the work on time. *Metropolitan Paving Co. v. United States*, No. 509-58, Ct. Cl., Dec. 13, 1963.

146. 125 Ct. Cl. 818, 113 F. Supp. 278 (1953).

147. 145 Ct. Cl. 387, 172 F. Supp. 454 (1959). See also *Snyder-Lynch Motors, Inc. v. United States*, 154 Ct. Cl. 476, 292 F.2d 907 (1961), where the Government provided a contractor with an estimate of material costs used by previous contractors, which estimate the Government knew from experience was incorrect.

148. 145 Ct. Cl. 387, 391, 172 F. Supp. 454, 457 (1959).

149. See *General Cas. Co. v. United States*, 130 Ct. Cl. 520, 127 F. Supp. 805 (1955); *Ragonese v. United States*, 128 Ct. Cl. 156, 120 F. Supp. 763 (1954); *Potashnick v. United States*, 123 Ct. Cl. 197, 105 F. Supp. 837 (1952).

150. — Ct. Cl. —, 312 F.2d 774 (1963).

a bid on the production of disinfectant powder. The powder and the chemical which was its primary ingredient had been previously produced for the Government under another contract and the Government was well aware of the unique properties of the primary ingredient. The Government allowed the contractor to bid without informing the latter that the powder required grinding before it was soluble; it knew that the contractor would need this information in preparing a proper bid, but in silence allowed the contractor to submit a bid without that vital information. After distinguishing the "independent duty to reveal data" from "material misrepresentation," the Court of Claims spoke of the "duty to share information." The Government cannot betray the contractor into "a ruinous course of action by silence."¹⁵¹ In short, there is a duty to cooperate and not to hinder performance or make it more difficult.

Transferring this duty to the area of delays caused by changes, the rule can be stated as requiring that there is "an implied obligation on the part of the United States not to cause unreasonable delay in making permitted changes in the contract"¹⁵² As the court said in *Continental Ill. Nat'l Bank v. United States*:¹⁵³ "We think the Government's taking 175 days for the redesign of the boiler house was inconsiderate of the harm which was being caused the contractor, and was a breach of the contract."¹⁵⁴

In other government-caused delay or interference situations, the Court of Claims' approach is similar. In *Volentine & Littleton v. United States*,¹⁵⁵ the Government flooded without warning the area which the contractor was engaged in clearing operations. The latter had to finish his operation, by more expensive methods, under one foot of water. The Court of Claims said: "The inconsiderate conduct was a breach of that term which every contract contains, by fair implication, that one party to a contract will not impede performance by the other party."¹⁵⁶

Then in *Ben C. Gerwick, Inc. v. United States*,¹⁵⁷ where the court found the Government was negligent and "failed to exercise reasonable diligence"¹⁵⁸ in providing sheets piles, the court agreed with the following statement of the rule: "Plaintiff contends that the contract contained

151. Id. at 778.

152. *J. A. Ross & Co. v. United States*, 126 Ct. Cl. 323, 332, 115 F. Supp. 187, 191 (1953).

153. 121 Ct. Cl. 203, 101 F. Supp. 755, cert. denied, 343 U.S. 963 (1952); accord, *F. H. McGraw & Co. v. United States*, 131 Ct. Cl. 501, 130 F. Supp. 394 (1955).

154. 121 Ct. Cl. 203, 101 F. Supp. 755, 757 (1952).

155. 144 Ct. Cl. 723, 169 F. Supp. 263 (1959).

156. Id. at 726, 169 F. Supp. at 265.

157. 152 Ct. Cl. 69, 285 F.2d 432 (1961).

158. Id. at 78, 285 F.2d at 437.

an implied obligation that defendant would affirmatively cooperate to make possible the performance of the work within the contract time, and would not through lack of diligence or negligence delay the work, or render its performance more expensive."¹⁵⁹

In a similar situation the court has spoken of "an implied obligation on the part of the Government not to willfully or negligently interfere with the contractor in the performance of his contract" ¹⁶⁰ In *Commerce Intl Co. v. United States*,¹⁶¹ the contractor alleged failure of the Government to be reasonably prompt in furnishing parts and drawings. The Court of Claims, in addition to a time extension, stated that the Government had breached its "obligation of reasonable cooperation." The court has repeatedly held that the sometimes harsh result of the *Rice* doctrine can be alleviated by imposing on the Government this broad duty expressed in several different ways. As stated in this case, "But this general principle [relief for delay is only an extension of time] presupposes that the Government has met the ever-present obligation of any contracting party to carry out its bargain reasonably and in good faith. Unless expressly negated, that duty is read into all bargains."¹⁶²

The Court of Claims, therefore, has been largely successful in maintaining the necessary flexibility to deal with these difficult procurement problems. It has also been able to re-examine old theories and evolve new ones when the situation demands imaginative legal analysis to achieve a just and equitable result.

VII. THE ATTITUDE OF THE ADMINISTRATIVE BOARDS

Where the Court of Claims has succeeded in building a sound legal structure in difficult areas of federal procurement, the various administrative boards have unfortunately not accepted this challenge and responsibility. The boards must shed their outworn and outmoded garments and realistically assume their proper roles in the adjudication of these disputes. The boards, it is submitted, should assume a parallel jurisdiction to the Court of Claims.¹⁶³

159. *Id.* at 76, 285 F.2d at 436.

160. *Peter Kiewit Sons Co. v. United States*, 138 Ct. Cl. 668, 674, 151 F. Supp. 726, 731 (1957).

161. No. 287-55, Ct. Cl., Oct. 16, 1964.

162. *Id.* at 5 (slip opinion).

163. It is interesting to note that the Comptroller General in a recent decision, Comp. Gen. Dec. B-152775, October 9, 1964, has stated that in situations where the passage of time has resulted in the contracting community accepting a particular doctrine as applied by one board as the proper interpretation of the standard default clause, *Fulford Mfg. Co., A.S.B.C.A. 2143* (1955) (the *Fulford* doctrine), then all boards should apply the same doctrine in similar circumstances. In effect, then, GAO is requiring parallel interpretation of standard contract clauses among all the administrative boards.

The administrative boards have already taken a few initial *procedural* steps in this direction as a result of the *Bianchi* decision. The ASBCA has announced that it will henceforth allow discovery under its rules to the same extent allowed by the rules of the Court of Claims or a United States District Court. The board stated, "In view of the Supreme Court decision in *Bianchi*, it is the Board's policy to lend its efforts to the parties in obtaining any evidence that could be obtained in a court proceeding."¹⁶⁴

The General Services Administration Board of Contract Appeals (GSABCA) has recently issued a revised set of rules.¹⁶⁵ The most significant changes are contained in those new sections detailing procedural matters dealing with the administrative record. It has been stated that some of these provisions are set forth specifically because of the *Bianchi* decision.¹⁶⁶ But procedural modernization, helpful and needed as it may be, is not sufficient. Jurisdictional modernization is essential.

Too often the efforts to broaden the jurisdiction of the boards are only to be found in futile dissents. In *Simmel-Industrie Meccaniche Societa, Per Azioni*,¹⁶⁷ the dissent quotes with approval the following language from an earlier unpublished dissent by another member of the board in the same appeal,

In my opinion we have developed an indefensible inconsistency which is attributable to confusion which has for years run rampant when a claim sounds a "delay" theory. When the Government interferes with the performance of a contract, be it time, place, or manner of performance, it changes the deal between the parties. If the contractor complies with the request implicit in the interference, either by word, act, or inaction, the parties should be regarded as accomplishing a change cognizable under the "Changes" article irrespective of whether acceleration or deceleration results.¹⁶⁸

But the ASBCA, the oldest and largest of the administrative boards still clings to outmoded concepts of its own jurisdictional limitations. It fails to heed the admonishment of the Court of Claims that "contracting officers and heads of departments should exercise the great powers conferred on them by these contracts to do equity; they should

164. Minutes of Prehearing Conference, June 29, 1964 (unpublished), Exotic Metal Products, A.S.B.C.A. 9338, 9404, 9428, 9568. See also Vitro Corp., I.B.C.A. 376, 1964 B.C.A. ¶ 4360.

165. General Services Procurement Reg. pt. 5-60, 41 C.F.R., ch. 5, pt. 5-60 (1964).

166. BNA Fed. Cont. Rep., No. 38, at A-4 (Nov. 9, 1964).

167. A.S.B.C.A. 6141, 61-1 B.C.A. 15229 (1961). See also Armond Cassil, Inc. A.S.B.C.A. 438, June 16, 1950 (dissenting opinion).

168. A.S.B.C.A. 6141, 61-1 B.C.A. 15229, 15236 (1961).

not feel under obligation to take advantage of technicalities, where to do so would defeat justice."¹⁶⁹

This same cry out of the wilderness of dissents is also found in the NASA Board, one of the newest of the administrative boards. In *Carpenter Constr. Co.*¹⁷⁰ the dissenting board member stated:

I am satisfied from the foregoing that the appeal states a case upon which relief can be granted with respect to all standby costs incurred by Appellant which are provable and otherwise proper to be taken into account in making an equitable adjustment. I think this Board has jurisdiction to grant the relief as an equitable adjustment under the "Changes" clause because there was a change from the date of availability set forth in the specifications to some later date.¹⁷¹

The NASA Board's opinion neatly sidestepped this issue by remanding the case to the contracting officer for consideration under the changes and changed conditions articles of the contract. It is hoped that when the issue is placed squarely before this board, it will adopt the views expressed so ably in the dissenting opinion.

The General Services Board of Contract Appeals has never firmly stated that there can be no recovery for standby costs. In *John McShain, Inc.*,¹⁷² that board stated:

In short, what is involved here is actually the precise opposite of an acceleration, which we may label a "deceleration" for convenience, which deceleration the record here indicates the Government actively and affirmatively desired. Applying the aforesaid standard of interpretation, we do not believe that a reasonably intelligent person would conclude that the words and phrases used in the contract here meant that for deferrals such as occurred here the appellant would be entitled to time extensions only, as contended by the Government.¹⁷³

Unfortunately in this case two change orders were before the board which specifically allowed money for the "deceleration," a delay desired by the Government. Pursuant to these change orders recovery was allowed. However, the board felt constrained to agree with the Government that there could be no compensation for a third period of delay since there was no change order covering this period. The board stated that this third claim "is tantamount to a claim for unliquidated damages for breach of contract and is thus outside the jurisdiction of this Board."¹⁷⁴ Here this board has bravely marched up to meet the problem

169. *Globe Indem. Co. v. United States*, 102 Ct. Cl. 21, 3S (1944), cert. denied, 324 U.S. 852 (1945).

170. N.A.S.A.B.C.A. 18, 1964 B.C.A. ¶ 4452.

171. *Id.* at 21433; see note 122 *supra*.

172. G.S.B.C.A. 1073, 1964 B.C.A. ¶ 4301.

173. *Id.* at 20795.

174. *Id.* at 20796.

—only to timidly retreat! There is recognition in a published opinion of another board that there may be such a doctrine of deceleration.¹⁷⁵

It is hoped that in the future, the GSBCA will determine to make its own jurisdiction more nearly parallel to that of the Court of Claims.

The Interior Board of Contract Appeals has taken a broader view of its own jurisdiction than has any of the other principal boards. In *Eastern Maintenance Co.*¹⁷⁶ the board discussed its equitable powers and stated:

The Board is cognizant of the limitations on its powers "to do equity" outside of the four corners of the contract. That lack of jurisdiction does not, however, restrict the Board's power to act equitably within the four corners and to make an equitable adjustment promised to the contractor by the explicit terms of the contract. Accordingly, what the contracting officer . . . has failed to do by way of completing such an equitable adjustment, the Board will do.¹⁷⁷

This language was approved and even expanded upon in *Cosmo Constr. Co.*¹⁷⁸ To date, however, the board has refrained from exercising these broad equitable powers in expanding its jurisdiction to parallel that of the Court of Claims. The necessary foundation has been laid, however, for the next logical step.

VIII. CONCLUSION

All of the principal boards, therefore, have not met the challenge of parallel jurisdiction. The boards seem to be the victims of institutional hardening of the arteries. It is submitted, however, that the boards have available at the present time the means by which this parallel jurisdiction can be achieved, without the need for additional legislation, further delegation of executive power, or the addition of new contract clauses.

In spite of the fact that at the present time the boards have the power and authority to achieve this parallel jurisdiction, many other solutions contemplating action outside of the boards have been advanced. These solutions may cover not only the question of jurisdiction but also broader questions of whether or not the administrative boards should be abolished entirely. Although there is substantial agreement among commentators that something should be done, there is not substantial agreement as to how the goals should be attained.

Of the two most frequently suggested solutions, the first appears to be too drastic and the second appears to be too cumbersome and, in fact,

175. See also *Rainier Co.*, A.S.B.C.A. 3565, 59-2 B.C.A. 11265, 11286 (1959), where "a de facto order to decelerate" is mentioned in passing.

176. I.B.C.A. 275, 1962 B.C.A. 18117.

177. *Id.* at 18119-20.

178. I.B.C.A. 412, 1964 B.C.A. ¶ 4059.

unnecessary. The most drastic proposal would be abolishing entirely the administrative boards and substituting for them some other scheme of administrative review of contract disputes.

One recently suggested solution would provide for a system of contract dispute resolution on three levels: contracting officer, hearing officer, and appellate court.¹⁷⁹ This proposal not only would abolish the administrative boards but also would abolish the Court of Claims jurisdiction in these disputes. There appears to be several objections to this scheme. The first, of course, is the practical objection of the difficulty in obtaining such drastic institutional surgery by means of legislation. Secondly, both the boards and the Court of Claims have built up over the years an expertise in the field; the destruction of this might well result in chaos and disaster.¹⁸⁰ It has taken a period of many years to arrive at the present development of the law of government contracts. To wipe this all out does not appear to be a satisfactory solution to the problem.

Another proposal suggests the addition of new contract clauses specifically granting to the boards jurisdiction over breach of contract cases. This solution is subject to criticism on the grounds that it might cause more chaos and confusion than now exists. There are at least fourteen boards now in existence,¹⁸¹ and each of these boards has slightly different charter provisions and many of them deal with different contract provisions in spite of the fact that the General Services Administration possesses the statutory authority to prescribe standard contract articles.¹⁸² Anyone familiar with the length of time consumed in inserting a new standard contract article would agree that, if this proposal were adopted, it would be many years before the benefits could be fully realized. The adoption of new contract clauses is a cumbersome and unwieldy administrative process. It is not necessary, however, to add contract clauses to arrive at a solution to the problem of parallel jurisdiction. The various administrative boards have a solution ready to be implemented at once.

The proposal suggested by the authors requires neither legislation nor

179. Note, *Government Contracts Disputes: An Institutional Approach*, 73 *Yale L.J.* 1403, 1454 (1964). In this scheme the hearing officer would be similar to a hearing examiner under the Administrative Procedure Act, 62 Stat. 99 (1948), 5 U.S.C. §§ 1001-11 (1953), or a Court of Claims commissioner. The appellate court would be a new court unaffiliated with any executive department or administrative agency.

180. These highly qualified judges and board members might be transferred to the newly created institutions, but there is no assurance that such would be the case.

181. See note 9 *supra*.

182. The Federal Procurement Regulations are prescribed by the Federal Services Administration under the Federal Property and Administrative Services Act of 1949, particularly 63 Stat. 378 (1949), 40 U.S.C. § 471 (1953). This function was transferred to the General Services Administration effective July 1, 1949. 63 Stat. 380 (1949), 5 U.S.C. § 630a (1953).

contract amendment; it does require action by the boards themselves to achieve their own parallel jurisdiction with the Court of Claims. The boards need only to apply more broadly the existing constructive change doctrine to cover those situations involving withholding of information, unreasonable delay, and misrepresentation. If there can be a *munc pro tunc* suspension of work, if there can be acceleration and impossibility, then there is no logical reason why the implementation of the doctrine of constructive change cannot broaden the boards' jurisdiction to include those situations where the Court of Claims now has sole jurisdiction.

If the administrative boards refuse to meet the challenge, then they have not met their obligations and more drastic solutions will be accepted. But the boards have in the past demonstrated the necessary institutional viability to cope with new theories and to advance new concepts and doctrines. It is submitted that in many instances past dissents should become the opinions of the boards.¹⁸³

If the boards can grant relief under the changes article in those situations where an action of the contracting officer directly affects the schedule of the contractor's performance¹⁸⁴ and also grant similar relief when the contracting officer misinterprets specifications or erroneously requires extra work,¹⁸⁵ then why should not actions of the contracting officer which delay performance admit of similar treatment?¹⁸⁶

Instances where the Government misrepresents certain facts or withholds information for which it knows the contractor has a need should not be treated as beyond the jurisdiction of the boards. There is little logical difference between the situation which exists when erroneous specifications are furnished and that which exists when other facts needed for preparing a bid are not correctly presented to the contractor (either misleading statements or misleading silence). It is illogical for the board to grant relief in the former situation by retroactively making the specifications possible of performance and fail to correct the latter situation in a similar fashion.

If the effect of *Bianchi* is, as a practical matter, that the contractor now will be entitled to only one hearing and that is a hearing on the administrative level, then parallel jurisdiction would result in an administrative hearing in all disputes which ultimately might reach the Court of Claims. But it is essential that the administrative boards assume this parallel jurisdiction not only because of the *Bianchi* ruling, but also because such jurisdiction would prevent the fragmenting of appeals under

183. See notes 122 & 160 *supra* and accompanying text.

184. See note 119 *supra*.

185. See notes 41-44 *supra*.

186. See note 122 *supra*.

one contract causing excessive delay and expense to the contractor. There are many situations where the contractor is involved in several disputes under one contract. At the present time some of these disputes could clearly fall under the administrative jurisdiction of the boards, but other of these disputes might be considered to be "outside of the contract," "breach of contract," or claims for "unliquidated damages" resulting in the refusal of the boards to take jurisdiction.

This forces the contractor either to take his chances with the Court of Claims and be dismissed because of failure to exhaust his administrative remedies (for those disputes under the contract), or to take his chances with an administrative board and be dismissed because of lack of jurisdiction. This is another important reason why parallel jurisdiction must be achieved. The legislation now being proposed¹⁸⁷ to overcome the effects of the *Bianchi* case does not lessen the validity of the argument that the boards should have parallel jurisdiction with the Court of Claims. The proposed legislation merely would permit a *de novo* trial before a commissioner of the Court of Claims not now permitted by the *Bianchi* decision. The proposed legislation does not broaden the jurisdiction of the administrative boards.

Under the doctrine of *Bianchi* and parallel jurisdiction is achieved, the contractor will have but one hearing in all appeals, and that hearing will be an administrative one. To suggest that the contractor should have available only one hearing in all cases would not alleviate the necessity for commissioners to assist the Court of Claims. The commissioners should continue to perform their important role in the ultimate resolution of these contract disputes. This role, however, would be slightly altered. If it is assumed that there will be but one hearing (an administrative hearing), then the decisions appealed to the Court of Claims will be

187. H.R. 10,765, 88th Cong., 2d Sess. (1964). This bill was introduced on April 9, 1964 by Congressman Emanuel Celler. It provides in pertinent part as follows:

No provision of any contract entered into by the United States or determination by a head of any department or agency or his duly authorized representative or board made pursuant to any such contract with respect to a dispute involving a question of fact arising under, or growing out of, the performance of such contract shall serve to limit in any manner any judicial proceeding in a court of competent jurisdiction relating to said dispute. Such court may decide the issues in a trial de novo and on the basis of such evidence as is admissible under the applicable rules of evidence: Provided, however, That a rebuttable presumption of correctness shall attach to any such administrative decision which presumption may be overcome by a preponderance of evidence received in court, the party challenging such decision having the burden of proof. Nothing herein contained shall be construed as relieving any party to the contract from the requirement of exhausting all of the administrative remedies provided for by the contract for the determination of disputes or as preventing a full administrative determination of all questions of fact but such determination shall not be final so as to preclude the de novo adjudication by a court of competent jurisdiction as hereinabove authorized.

SEC. 2. This Act shall be applicable to all judicial proceedings pending on or instituted after the date of its enactment.

dealt with by that court by means of either motion for summary judgment or an assignment of errors. The role of the commissioners of the Court of Claims should be to assist the court by making findings and recommendations. It is not realistic to expect the full court acting alone to decide promptly and without undue delay complex legal problems based upon a lengthy and often cumbersome administrative record.¹⁸⁸ The court will continue to require the assistance of the commissioners.

It is submitted that it is essential for the orderly resolution of contract disputes for the administrative boards to assume a parallel jurisdiction to that of the Court of Claims. Even if the proposed legislation were to become law and as a result *de novo* proceedings would once again be possible before the Court of Claims, parallel jurisdiction will be required to avoid the needless delay and expense to the contractor of piecemeal hearings. The boards already have the legal basis for achieving this parallel jurisdiction by means of the constructive change doctrine. As was stated previously, the administrative boards can and should hear, consider, decide and grant relief under all situations where the Court of Claims itself has jurisdiction. The traditional dichotomy between administrative relief and breach of contract relief should be discarded in favor of a more flexible approach by the administrative boards.

188. The magnitude of the argumentation before the Court of Claims (and presumably an administrative board under Bianchi) has been commented upon in *Flippin Materials Co. v. United States*, — Ct. Cl. —, 312 F.2d 408, 410 n.1 (1963):

Plaintiff's exceptions to the findings total 87 printed pages, and it answers the defendant's exceptions in an additional 152 printed pages; the plaintiff's briefs total 137 further printed pages. Defendant's exceptions to the findings mount to 281 mimeographed pages; it answers plaintiff's exceptions in the course of its own exceptions as well as in its brief of 169 mimeographed pages. The total argumentation is 826 pages. Copious references are also made to the findings requested from the commissioner.

In view of the magnitude of such a record, it is naive to assume that the court can digest it without the assistance of able commissioners.